Supreme Court, U.S.
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NO. 88-1682

In the

Supreme Court of the United States

October Term, 1988

DONALD A. BREMNER,
DOROTHY G. BREMNER,
KATHLEEN M. FISCHEL,
CORINNE C. STRAUSER,

Petitioners

v.

HAWAII HOUSING AUTHORITY,
State of Hawaii and its
Designee Arbitrator,
WENDELL H. MARTIN,
KALAMA LAND COMPANY, LTD.

Respondents

PETITIONERS,

REPLY BRIEF

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Petitioner's Reply Brief to Respondent
Kalama Land Co, Ltd.'s Brief in Opposition

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a. Reply to Questions Presented:

Respondent's statement under this heading only serves to corroborate the fact that the Hawaii Supreme Court failed to address the Constitutional issues raised in subject case. Respondent's Brief does not address them either. The Hawaii court opted instead to stress "form" rather than "substance" in contravention of their established precedent and policy to do otherwise and to adjudicate important legal issues.

Manifest justice requires that some court in our country's judicial system address the question of an unconstitutional impairment of contracts at the hands of a State designated arbitrator under State law.

e. Reply to Grounds for Jurisdiction:

Respondents themselves were responsible for officially entering the decision of the Hawaii Supreme Court in the subject case(Judgement on Appeal - Appendix 6, Petitioner's Writ of Certiorari) on December 9, 1989.

USC Title 28-2101(c) states:

> Any other appeal or any writ of certiorari intended to bring any judgement or decree in a civil action or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgement or decree.

In Judicial proceedings in the State of Hawaii a Judgement is not rendered final and is not effective until it is entered. It is not entered until it is officially filed with the clerk of the court. In the words of Rule 58 of the Hawaii Rules of Civil Procedure, "The filing of the Judgement in the office of the clerk constitutes the entry of the Judgement and the Judgement is not effective before such entry." (emphasis added)

Rule 26 of the Hawaii Rules of

Appellate Procedure also states that,

"The filing of the Judgement constitutes entry of the Judgement."

See also, Naki v. Hawaiian Electric Co. , 50 Haw 85, wherein the court found that finality does not attach to Judgement until written order on the motion is filed. Time requirements for filing appeals in civil actions in the State run from the time of entry of the Judgement meaning the filing of the Judgement with the clerk of the court.

Petitioners relied on this Judicial practice and the meaning of the terms involved as defined and commonly used in the course of that practice.

Consequently, running from December 9,1988, the 90 days specified by USC 28-2101(c) expired at 12:01 am on March 10, 1989. Petitioner's application for Writ of Certiorari was postmarked and docketed on March 8, 1989 and therefore timely.

g. Reply to Statement of the Case:

Respondent's statement contained in this section of their Brief in opposition should be stricken as groundless.

j. Reply to Argument:

I. (A) Respondents assert that Petitioners failed to file a timely motion to vacate, modify or correct arbitration awards and failed to comply with the ten day time limit.

At no time in the court proceedings below did Petitioners fail to meet filing deadlines required by Hawaii Statutes or court rules. The arbitrator's decision was received by Petitioner's Bremner and Strauser on February 28,1987 and by Petitioner Fischel on March 2, 1987. On March 10,1987, within the 10 days required by HRS 658-11, Petitioners filed a Notice of Appeal citing HRS 658 as a foundation. This Notice of Appeal was construed by the court to be a Motion to Vacate, Modify or Correct

Arbitration Awards(See Petitioner's Writ of Certiorari - Appendix 1). Consequently, Respondent's claim that the appeal was not timely is erroneous.

(B) Contrary to Respondent's contention here also, Petitioners do not claim that Judge Richard Y. C. Au extended the time to file a motion to vacate the arbitration awards. Judge Au did not need to extend the time since the complaint was filed within the 10 day requirement.

In ruling on a motion to dismiss Petitioner's complaint because it failed to join the Kalama Land Company, Judge Au found that in accordance with court precedent and case law, misjoinder of a party was not ground for dismissal. Indeed this is the precedent and policy of the Hawaii Supreme Court(See Petitioner's Writ of Certiorari, Argument, pages 20-23).

Judge Au did order the Kalama Land Company to be joined and provided 10 days

in which to do so,(See Petitioner's Writ of Certiorari -Appendix 1).That requirement was timely met when Petitioners filed the Second Motion to Vacate, Modify or Correct Arbitration Awards on May 19,1987 within 10 days of the entry of Judge Au's order on May 11, 1987.The above motion was served on Kalama Land Company on May 19,1987. That service is part of the record and any statement or finding that Kalama was never served is just plain untrue. Consequently HRS 658 was complied with in this fashion.

Also if misjoinder cannot be ground for dismissal, then the time to remedy a misjoinder cannot be ground for dismissal.Where actual parties have actual notice of suit they suffer no predjudice from a technical defect(Jordan v. U. S., 694 F2d 837).

If, as Respondent argues, and the Hawaii Supreme Court opined, Petitioners are to be denied the applicability of

the rule of law that misjoinder is not ground for dismissal , then due process and equal protection under law for them is jeopardized also.

II. Contrary to Respondent's claim that the court's function is to uphold "public policy", Petitioners believe its function is to seek justice. Where the arbitration process has been abused and where it has been capricious and violated the constitutional rights of parties, the court is compelled to provide manifest justice.

Fortunately many courts are aware of the distinction between "policy" and justice holding on the general rule that,

> "..... arbitration of a dispute with finality placed on arbitration by a statute cannot be equated with a litigant's remedy at law for a wrong." (State v. Williams, 12 OR 133;505 P2d 936)

Respondents would have arbitration become a substitute for justice not a servant to it. The so-called policy needs up-dating

also. The cases cited by Respondent to justify a policy favoring the results of arbitration proceedings all occurred prior to the passage of HRS 519-2(1975) which mandates arbitration of lease rents by law. The policy referred to by Respondents is founded on the concept that arbitration was voluntary, mutual and private. The subject arbitration was mandatory under State law, invoked by one party(Kalama) and conducted by a single arbitrator whose decision is devoid of findings of fact or conclusions. In addition HRS-519 provides a multi-faceted formula for arbitrators to follow in setting lease rents. The only available authority to determine whether the arbitrator followed the law, and check and balance abuses if he did not, is the court. Other courts have recognized this need rather incisively.(See Corpus Juris Secondum 6,154,p-412)

> " A mistake or error of law or fact which is so gross and palpable as to be evidence of misconduct or undue partial-

ity may however be a ground for impeachment as may be a misconception of law which is so perverse as to work manifest injustice." Matter of Wilkens, 169 NY 9462

Other courts have solidified the holding that an award may be set aside if error of law is so substantial that, but for it, the award would have been substantially different(St. Barnard v. Detroit Auto Insurance Exchange, 350 NW 2d 84; Taylor v. Fitz Coal Co. 618 SW2d 432;Beaufort Concrete Co. v. Atlantic States Const. Co. 352 F2d 460; Jacob v. Pacific Export & Lumber Co., 297 P 848, and Northern States Const. Co v. Bandero, 346 P2d 625.)

Petitioner's submit that a violation of their constitutional rights by impairment of existing contracts is a gross error and misconception of law perversely worked on them by a State designated arbitrator under State law. The result has saddled them with a manifest constitutional injustice, which if left intact, will continue to oppress

their pursuit of a happy domicile for the remainder of their lease terms(some 21-26 years) and possibly longer. Such a basic injustice commands review by the Supreme Court.

Dated this 4TH day of MAY, 1989

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